



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

PETITION NO. 22 OF 2012

OMAR TAHIR SHEIKH SAID.....PETITIONER

VERSUS

1. REGISTRAR OF TITLES

2. COMMISSIONER OF LANDS.....RESPONDENTS

AND

1. KENYA CIVIL AVIATION AUTHORITY1ST INTERESTED PARTY

2. ETHICS AND ANTI-CORRUPTION COMMISSION.....2ND INTERESTED PARTY

JUDGMENT

1. The Petition is premised on Section 23 of the Registration of Titles Act Cap 281 Laws of Kenya (repealed) which provided that a Certificate of title issued by the registrar to any purchaser of land is to be taken by all courts as conclusive evidence that the person named therein as the proprietor of the land is the absolute and indefeasible owner thereof and his title is not subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party.

2. Omar Tahir Sheikh Said, the petitioner filed this petition against the Registrar of Titles, the 1st Respondent, Commissioner of Lands, the 2nd Respondent, Kenya Civil Aviation Authority, the 1st Interested Party and the Ethics and Anti-Corruption Commission, the 2nd Interested Party.

3. The Petitioner averred that at all material time it was the lawful registered proprietor for value of all that piece of land known as **LR.MN/1/2411** registered under the Registration of Title Act (now repealed). That the Petitioner purchased the said plot for value without notice of any defect in title considering that the same had been allocated to one Zakayo Kipkemoi Cheruiyot by the president through the powers delegated to the then commissioner of lands under the provisions of the Government Land Act Cap 280 (now repealed).

4. The said land is in dispute in a pending suit before this court namely, **Kenya Anti-Corruption Commission –vs- Zakayo Kipkemoi Cheruiyot & 2 Others – Mombasa High Court Civil Case No. 177 of 2009.**

5. On 26th November, 2010, the 1st Respondent purported to revoke the Petitioner’s Title to the suit land. It is the Petitioner’s case that the revocation of its title was done without the Respondents giving the Petitioner the opportunity to be heard which is in total contravention of the principles of natural justice and the right to a fair hearing as provided under Article 50 (1) of the constitution. The petitioner also asserts that there is breach of Article 47(1) of the constitution which provides for a fair administrative action. The petitioner argued that the revocation by the 1st Respondent infringed on its rights under Article 40 of the constitution.

6. The petitioner further avers that the revocation is a negation and violation of the petitioner’s constitutional right to have the matter heard and finally determined by a court of competent jurisdiction in **HCCC NO.177 of 2009 – Mombasa.** The petitioner’s case is supported by the affidavit of Omar Tahir Sheikh Said sworn on 27th Febuary, 2012.

7. The petitioner therefore sought the following reliefs:

a) A declaration that the respondent’s revocation of the Petitioner’s title to all that parcel of land comprised in the title LRMN/1/2411 is unconstitutional, null and void abinitio

b) A declaration that Grant of Title to the Petitioner in respect to the suit property is conclusive evidence of ownership and the petitioner is the absolute and indefeasible owner of the suit property unless the same is revoked by the court.

c) An order of certiorari do issue to bring into this honourable court for the purposes of being quashed, the 1st Respondent's Gazette Notice Number 15570 dated 26th November, 2010 purporting to revoke the petitioner's title to all that parcel of land comprised in Title Number LR MN/1/2411- Mombasa.

d) An order of prohibition do issue to prohibit the respondent's by themselves, servants agents or whomsoever from alienating the petitioner's parcel of land comprised in Title Number LR.MN/1/2411-Mombasa or in any manner interfering with the petitioner's possession of the said premises.

e) An order of prohibition to issue to prohibit the Respondent's by themselves, servants, agents or whomsoever from in any manner whatsoever from issuing any title and/or license in respect to the petitioners land comprised in Title Number LR.MN/1/2411 or registering any encumbrances thereon.

f) An order of Mandamus do issue to compel the respondent's by themselves, servants or agents or whomsoever to delete any entry on the petitioner's title made as a consequence to or in furtherance of all that parcel of land comprised in LR.MN/1/2411-Mombasa

g) The costs of this petition be borne by the 1st and 2nd respondent.

h) Or such orders as this honorable court shall deem just.

8. The Respondents did not oppose the petition as no affidavits were filed in response. The 1st Interested Party opposed the petition through a replying affidavit sworn by Cyril S. Wangong'o sworn on 6th June 2016. Counsel for the 1st interested party submitted that the petition is sub judice and an abuse of the court process since it was filed to circumvent the issues raised in **High Court Civil Suit No.177 of 2009** which is still pending hearing and determination.

9. The 2nd Interested Party opposes the petition although no affidavit was filed. Counsel for the 2nd Interested Party submits inter alia, the it's claim in **HCCC No.177 of 2009** challenges the process leading to the creation and alienation of the suit property and that the transfer to the petitioner was a nullity in the first instance. It is also submitted that the petitioner's right to ownership of property as envisaged in Article 40 of the constitution does not extend to any property that is acquired willfully. Further, it was submitted by counsel for the 2nd interested party that granting the orders sought in the petition will negate the claims raised by the 2nd interested party in **HCCC No.177 of 2009**, and that it would defeat the 2nd interested party's efforts to recover the suit property on behalf of the 1st interested party and protect the public interest. The 2nd interested party further submitted that prayers (c) to (f) in the petition are for orders for judicial review which ought to have been presented to the court within six months of the revocation.

10. I have considered the pleadings, submissions by counsel for the parties and the authorities relied on. In my view, the issue for determination is whether the 1st respondent, the Registrar of Titles had the authority to revoke the petitioner's title.

11. A title to property, however acquired, has legal protection. The issue of revocation of title is not new and has been the subject of several decisions of our courts. See for example **Kuria Greens Limited – vs- Registrar of Titles (2011)eKLR, Sound Equipment Limited –v- Registrar of Titles & Another; Power Technical Limited –v- The Hon. Attorney General & 2 Others (2012)eKLR; Republic –v- Kisumu District Lands Officer & Another (2010)eKLR; Kenya Breweries Ltd –V- Municipal Council of Mombasa (2009)eKLR.**

12. In the above cited cases, the courts have established the following principles; first the Registrar of Titles has no authority under the Registration of Titles Act (repealed) to revoke a title by way of a Gazette Notice in the manner he did. Second, such revocation is a breach of Article 40 of the Constitution as it constitutes an arbitrary acquisition of property without compensation. Thirdly, it is clear that the petitioner was not given a hearing to contest the allegations subject of the revocation.

13. In the case of **Satima Enterprises Ltd –v- Registrar of Titles & 2 Other (2012)eKLR**, Majanja, J. held as follows:

“Serious allegations of fraudulent acquisition have been raised but I have been circumspect in dealing or commenting on them for several reasons. Firstly, Article 46 (6) as I have held contemplates a legal process to establish these kinds of issues. (see Chemei Investments Limited –v- The Attorney General & Others Nairobi Petition No. 94 of 2005) (unreported). In this case there was no counter petition upon which the court could make finding or grant relief to the respondents on the basis of the fraud alleged. Secondly, there is in fact a case pending between the parties in respect of the suit property... In that case the same issues of fraud alleged in this suit have been raised and the court adjudicating over the suit will no doubt deal with them. I therefore find and hold that the issuance of the Gazette Notice No.6332 in relation to this suit property was in fact an attempt to undercut the pending proceedings and also a breach of the petitioners rights under Article 40 and 47 (1) of the Constitution.”

14. It is not disputed that the petitioner was the registered proprietor of all that property known as **LR MN/1/2411**. The petitioner holds a grant to the property issued under the Registration of Titles Act Cap 281 Law of Kenya (now repealed). It is also not in dispute that there is a case pending between the parties in respect of the suit property to wit. **Mombasa ELC No.177 of 2009 Kenya Anti- Corruption Commission –v- Zakayo Kipkemoi Cheruiyot, Omar Tahir Sheikh Said and Sammy Silas Komen Mwaita**. In that case the same issues of fraud alleged in this suit have been raised and the court adjudicating over the suit will no doubt deal with them.

15. As was held in the cases mentioned above, I find that the 1st Respondent had no authority under the Registration of Titles Act (repealed) to revoke the title by way of Gazette Notice in the manner he did. I therefore find and hold that the issuance of Gazette notice NO. 15570 in relation to the suit property was in fact an attempt to undercut the pending proceedings and also a breach of the petitioner's right under Article 40 and 47 (1) of the Constitution.

16. In view of what I have stated and taking into account all the circumstance, I allow the petition to the extent that I now grant the following reliefs;

a) A declaration be and is hereby issued declaring that Gazettee Notice No.15570 dated 26th November 2010 in so far as it purports to revoke the Petitioner's Title No. LR MN/1/2411, Mombasa is null and void.

b) The petitioner is restrained from selling, dealing or transferring the said property pending the hearing and determination of Mombasa ELC No.177 of 2009.

c) The petitioner shall have costs jointly and/or severally against the Respondents and the interested parties.

DATED, DELIVERED and SIGNED at MOMBASA this 17TH day of October, 2018

C. YANO

JUDGE